Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In The Matter of	)	
1998 Biennial Regulatory Review -- Reform of the International Settlements Policy and Associated Filing Requirements	)	**IB Docket No. 98-148**
Regulation of International Accounting Rates	)	**CC Docket No. 90-337**

COMMENTS OF THE TELECOMMUNICATIONS RESELLERS ASSOCIATION

The Telecommunications Resellers Association ("TRA"),[1] through undersigned counsel and pursuant to Rule 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, hereby submits its comments on the *Notice of Proposed Rulemaking*, FCC 98-190, released in the captioned proceeding on August 6, 1998 ("*Notice*"). In the *Notice*, the Commission proposes to further

[1] A national trade association, TRA represents more than 650 entities engaged in, or providing products and services in support of, telecommunications resale. TRA was created, and carries a continuing mandate, to foster and promote telecommunications resale, to support the telecommunications resale industry and to protect and further the interests of entities engaged in the resale of telecommunications services. TRA is the largest association of competitive carriers in the United States, numbering among its members the majority of domestic providers of interexchange and international services. Included among TRA's membership are the vast majority of the carriers identified by the Commission as the "Top Providers of Pure Resale International MTS" and a significant percentage of the carriers listed by the Commission as the largest international "Facilities-Based and Facilities-Resale Carriers," as well as carriers based in Australia, Canada, France, the Netherlands, Switzerland and the United Kingdom. Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission, Trends in Telephone Service, Tables 7.4 & 7.5 (July 1998).

liberalize its international settlements policy ("ISPs") and associated rules. TRA supports the Commission's efforts to relax or remove regulations which are no longer necessary to protect against anti-competitive abuses by dominant foreign carriers or which impede competition in the provision of international telecommunications services. TRA, however, urges the Commission to move cautiously, retaining sufficient safeguards to protect U.S. carriers, particularly smaller providers, in their dealings with foreign carriers possessed of market power in their home markets.

The *Notice* proposes to liberalize the manner in which the Commission applies its ISP in a number of significant ways. First, the *Notice* would no longer apply the ISP to arrangements involving either World Trade Organization ("WTO") Member country-based carriers which lack market power or carriers, irrespective of their market power, based in WTO Member countries to which U.S. carriers are authorized by the Commission to provide international simple resale ("ISR"), and would eliminate as to such arrangements the requirement that U.S. carriers file associated contracts and settlement rate information. The *Notice* further proposes to expand the Commission's flexibility policy to permit carriers to enter into flexible settlement arrangements affecting less than 25 percent of the traffic on a given route without revealing either the name of the foreign correspondent or the terms and conditions of the agreement. Finally, the *Notice* proposes to relax the Commission's ISR rules, "No Special Concessions" rule, and accounting rate notification requirements.

TRA concurs with the Commission that there is little threat of "whipsawing" of U.S. carriers by foreign providers that lack market power. As the *Notice* correctly points out, any attempt to engage in such conduct by a carrier that does not retain "bottleneck" control over facilities and

services essential to terminate international traffic could be easily thwarted by simply arranging with another carrier for the provision of the necessary terminating access. Hence, there is no longer a compelling reason to restrict the flexibility of U.S. carriers to negotiate, free of the accounting rate and proportionate return requirements of the ISP, commercial arrangements with WTO Member country-based foreign providers that lack market power in their home markets. Likewise, TRA concurs with the Commission that there is little reason to retain the contract and accounting rate filing requirements as they apply to arrangements with foreign carriers that lack market power in a WTO Member country.

TRA, however, does not agree with the *Notice* that carriers that control less than a 50 percent share of their home market should be presumed to lack market power for purposes of applying the ISP. The *Notice* predicates its proposal on the rebuttable presumption established for purposes of applying the No Special Concessions rule that foreign carriers with "less than a 50 percent market share in each relevant market on the foreign end lack sufficient market power to affect competition adversely in the U.S. market."[2] In the context of the No Special Concessions rule, however, the Commission continued to require U.S. carriers accepting special concessions from foreign carriers that possessed less than a 50 percent market share to file with the Commission associated "contracts, operating agreements, and other arrangements," as well as data "to substantiate . . . [the] claim for the relevant input markets on the foreign end of the international route."[3] These

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[2] Rules and Policies on Foreign Participation in the U.S. Telecommunications Market (Report and Order and Order on Reconsideration), 12 FCC Rcd. 23891, ¶ 161 (1997), *recon. pending.*

[3] Id. at ¶¶ 162 - 163.

filing requirements allow the Commission and other interested parties to assess the foreign carrier's market power and to rebut the presumption of a lack thereof.

As the *Notice* correctly points out, if, for purposes of applying the ISP, contract filing requirements are eliminated, neither the Commission nor interested parties would have ready access to the information necessary to determine whether an arrangement qualifies for exemption from the ISP, or for that matter the No Special Concessions rule. While the *Notice* proposes that the U.S. carrier entering into the ISP-exempt arrangement could be required "to identify the foreign carrier and publicly file data indicating that the foreign carrier possesses less than 50 percent market share in each of the relevant markets,"[4] such a requirement would undercut one of the principal purposes for relaxing the ISP -- *i.e.*, limiting the disclosure of settlement rates. TRA submits that a preferable approach would be to reduce to 25 percent the level of market share at which a lack of market power would be presumed and not require any filing, other than a carrier certification, to substantiate the claim that the foreign carrier lacks market power. Such an approach would not only fully realize the purpose for which the ISP is being liberalized, but would better reflect the realities of the marketplace.

While the Commission is correct that "[c]ourts virtually never find monopoly power when market share is less than about 50 percent,"[5] the experience of TRA's resale carrier members reveals that market power often can be exercised by a provider with a substantial market share in a market populated by two, or even three or four, carriers. The cellular market is but one example of

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[4] Notice, FCC 98-190 at ¶ 23.

[5] Rules and Policies on Foreign Participation in the U.S. Telecommunications Market (Report and Order and Order on Reconsideration), 12 FCC Rcd. 23891 at ¶ 161.

a marketplace in which both carriers exercised market power in dealing with other carriers. The current wireless market is an example of a market populated by three or more carriers in which all carriers exercise market power in dealing with other carriers. While even a carrier with a 25 percent market share can wield market power in the right circumstance, a presumption that it cannot do so is likely to be borne out in most circumstances.

TRA's approach would likely not significantly diminish the impact of ISP liberalization, because, as the *Notice* points out, "most foreign markets are divided between a former incumbent with a market share well over 50 percent and new entrants with market shares far below 50 percent."[6] TRA's approach would, however, allow for elimination of contract filing requirements in conjunction with liberalization of the ISP while minimizing the possibilities that such regulatory relief will adversely affect competition in the U.S. market.

To this same end, TRA urges the Commission to limit its relaxation of the ISP to only those foreign carriers that lack market power in their home markets. TRA disagrees with the *Notice* that ISP liberalization should be extended to arrangements between U.S. carriers and all carriers based in a WTO Member country to which U.S. carriers are authorized by the Commission to provide ISR, including carriers possessed of market power in those countries. The ability to engage in anti-competitive conduct always accompanies market power. Admittedly the opportunity to engage in ISR not only suggests that no carrier in the foreign market is exercising market power either because the Commission has determined that equivalent resale opportunities exist in the market or 50 percent of traffic is being settled at or below the Commission's benchmark settlement rates, but in and of itself creates downward pressure on telecommunications prices. Nonetheless,

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[6] Notice, FCC 98-190 at ¶ 23

particularly in markets where the legal authority to compete has not generated more than incipient facilities-based competition, a carrier possessed of market power retains the ability to use its market position to thwart ISR and to discriminate among U.S. carriers.

TRA submits that a preferable approach would be to limit liberalization of the ISP to carriers that lack market power in WTO Member countries, while continuing under the Commission's flexibility policy to provide U.S. carriers with the opportunity to seek authorization to deviate from the ISP with respect to foreign carriers that retain market power.[7] TRA's approach should address the concern expressed in the *Notice* that U.S. carriers are not fully availing themselves of the options provided by the Commission's flexibility policy without opening the door to potential anti-competitive abuses by foreign carriers that retain market power.

Consistent with this approach, TRA opposes the relaxation of the Commission's flexibility policy proposed in the *Notice*. TRA submits that if and when an alternative arrangement is negotiated by a U.S. carrier with a foreign provider possessed of market power in its home market, the Commission should continue to require the petitioning U.S. carrier to disclose the name of the foreign correspondent and the terms and conditions of the arrangement, as well as to apply the Section 43.51 contract filing requirements. As the Commission has previously noted:

> [A]llowing carriers with a significant share of the market to negotiate alternative arrangements may have unanticipated anticompetitive effects in the U.S. market for IMTS service . . . [T]here may be circumstances under which a foreign carrier with a significant share

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[7] Consistent with this approach, TRA would not oppose liberalization of the ISP as it relates to non-WTO Member country-based carriers that possess less than a 25 percent market share and otherwise lack market power in their home markets, although TRA supports the Commission's use of ISP liberalization to encourage non-WTO Member countries to open their markets to competition. Rules and Policies on Foreign Participation in the U.S. Telecommunications Market (Report and Order and Order on Reconsideration), 12 FCC Rcd. 23891 at ¶ 161.

> of its market may have the ability and incentive to misuse its market power to discriminate against U.S. carriers, notwithstanding the existence of effective competitive opportunities in the foreign market . . . Therefore, while we decline to preclude dominant or large carriers from negotiating alternative arrangements, we adopt competitive safeguards to protect against potential anticompetitive actions by foreign and U.S. carriers with a significant share of their markets, and to provide a "safety net" for possible unanticipated consequences of our ISP flexibility policy.[8]

TRA urges the Commission to preserve this "safety net," requiring all alternative settlement arrangements with foreign carriers possessed of market power in their home markets to be made public, as well as retaining its existing requirements prohibiting the inclusion of unreasonably discriminatory provisions in, and the public filing of, alternative arrangements that affect more than 25 percent of the outbound or inbound traffic on a particular route and requiring the public filing of all alternative arrangements between affiliated carriers and carriers involved in non-equity joint ventures. TRA agrees with the Commission, however, that the public filing requirement should only be applied to affiliated and joint venture entities which possess market power in the foreign market.

TRA urges the Commission to continue to use ISR as a mechanism for putting greater pressure on settlement rates. Carriers engaged in ISR can price more aggressively simply because, by leasing circuits between markets, they can avoid accounting rates set above cost as a result of limited competition. Moreover, ISR provides smaller carriers which are unable to negotiate beneficial agreements with dominant providers with an alternative means of global market entry. TRA, however, also acknowledges the Commission's legitimate concern that ISR can produce

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[8] Regulation of International Accounting Rates (Fourth Report and Order), 11 FCC Rcd. 20, 0361, ¶¶ 44 - 45 ((1996)

market distorting results through "one-way bypass" of the accounting rate system. TRA, accordingly, recommends only limited expansion of ISR. Specifically, TRA suggests that carriers transporting less than five percent of the traffic on a given route should be permitted to engage in ISR between the U.S. and any WTO Member country.

As to the Commission's No Special Concessions rule, TRA, consistent with its approach throughout these comments, urges the Commission to continue to apply that rule to arrangements with any foreign carrier that possesses market power in its home market. In TRA's view, no U.S. carrier should be able to enter into with a foreign carrier possessed of market power exclusive arrangements "with respect to operating agreements, interconnection of international facilities, private line provisioning and maintenance, as well as quality of service."[9] Exclusive arrangements, by their nature, diminish competition. When such arrangements involve a dominant provider, their impact can be devastating, particularly on small carriers which lack the economic muscle to demand exclusivity.

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[9] Notice, FCC 98-190 at ¶ 40.

By reason of the foregoing, the Telecommunications Resellers Association urges the Commission to liberalize the ISP and implement other regulatory relief proposed in the *Notice* in a manner consistent with these comments.

Respectfully submitted,

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September 16, 1998

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